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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner EL AL respectfully files this supplemental brief to address the issues raised by the supplemental briefs of the United States as *amicus curiae* and respondent. The Solicitor General has apprised the Court of the prospective ratification of Montreal Protocol No. 4,[1] which most likely will enter into effect in early 1999, and also of the Solicitor General's views on the significance of the amendment of Article 24 in Montreal Protocol No. 4. Respondent seeks to limit the scope of the question granted review by the Court and urges *sua sponte* dismissal of the writ.

[1] Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975.

For the reasons set forth in the supplemental brief for *amicus curiae* United States and the reasons set forth herein, prospective ratification of Montreal Protocol No. 4 does not render unnecessary for review by the Court the question of the exclusive application of Article 17 of the Warsaw Convention[2] treaty to passenger injuries sustained in the course of "international transportation." Accordingly, petitioner respectfully urges the Court to give plenary consideration to the question presented.

The proper interpretation of the unamended Warsaw Convention is a matter of continuing importance to the lower courts, to EL AL and all other carriers providing security for international air transportation, and to the travelling public. The exclusivity issue should be reviewed and settled by the Court to ensure the uniform and proper application of the treaty to all pending Warsaw Convention personal injury actions and all future personal injury actions governed by the unamended Warsaw Convention, and to preempt all future claims that an action can be "found to be outside the Convention" (*Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997), *cert. granted in part*, 118 S. Ct. 1793 (1998) (JA 40-62)), whether unamended or amended by Montreal Protocol No. 4.

1. Montreal Protocol No. 4 does not substantially change Article 24 of the Warsaw Convention as it relates to passenger cases

The Solicitor General asserts that amended Article 24(1) "squarely forecloses" any argument that personal injury claims arising subsequent to ratification of Montreal Protocol No. 4 could be brought outside the terms of Article 17 of the Convention. (US Supp. Br. 4). Set forth below are Article 24

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note).

in its unamended form and as amended by Montreal Protocol No. 4.

Article 24 (Warsaw Convention)	Article 24 (Montreal Protocol No. 4)
1. In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.	1. *In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention*, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
2. *In the cases covered by article 17 the provisions of the preceding paragraph shall also apply*, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020 (1934).	2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

The revision in the introductory phrase from "cases covered by Article 17" to "carriage of passengers and baggage" and incorporation of the language referencing the preceding paragraph (noted in italics) are not substantive changes.[3] Article 17 is the only provision of this treaty which, it has been held, creates a cause of action for personal injury. Passengers must satisfy the Article 17 conditions to a right of recovery under the unamended Convention and Montreal Protocol No. 4 irrespective of whether the Protocol makes express reference to Article 17. In other words, both introductory clauses are referring a passenger to the same underlying provision---Article 17. Thus, EL AL agrees with the view of the Solicitor General that "the *result* should be the same" under both the unamended Convention and Montreal Protocol No. 4. (US Supp. Br. 4 (emphasis in original)). The treaty is exclusive whether unamended or as soon to be amended. However, the court below held to the contrary on the exclusivity issue which the Court has agreed to review.

2. The "however founded" language in Article 24 upon which the lower courts rely to avoid the exclusive application of the Convention remains unchanged

The lower courts have found that the Warsaw Convention is not exclusive based on the parsing of the "however founded" phrase of Article 24. The "however founded" phrase remained unaltered in the passenger[4] provision of amended Article 24.

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[3] *Accord Northeastern Florida Chapter of Associated General Contractors of Am. v. Jacksonville, Fla.*, 508 U.S. 656, 662 n.3 (1993).

[4] Montreal Protocol No. 4, to which the Senate gave its advice and consent, amends and updates the cargo provisions of the Convention. Montreal Protocol No. 3, which was intended to address passenger liability issues but to which the U.S. has no intention of adhering, contains the same clarification of the Article 24 "however founded" phrase—"whether under this Convention or in contract or in tort or otherwise"—found in the amended cargo provision of Montreal Protocol No. 4. Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975.

(footnote continued)

Accordingly, unless the exclusivity issue is addressed, the argument will continue to be raised that "any action for damages, however founded" gives recognition to causes of action outside the Convention. Numerous courts have viewed the "however founded" phrase as an express indication that a passenger's action may be "founded" on state law, albeit subject to the conditions and limits of the Convention. *See, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1492 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (Mikva, J., dissenting) ("Article 24's reference to 'any actions for damages, however founded' clearly contemplates actions arising under separate sources of law but places some limits on recovery."); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) ("the language of Article 24(1) that any action, 'however founded,' must be brought subject to the conditions and limits of the Convention, might be taken to mean that an action must be 'founded' on some law other than the Convention."); *Estenssoro v. American Jet, S.A.*, 944 F. Supp. 813, 817 (C.D. Cal. 1996) ("The Court therefore finds the inclusion of the words 'however founded' in Article 24 of the Convention indicates their intent that the Convention not preempt causes of action based on state law."); *see also Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218, 1220-21 (N.D. Cal. 1993) (providing comprehensive list of "however founded" decisions).

In addition, where plaintiffs artfully plead state law claims, this faulty analysis has enabled district courts to improperly issue remand orders declining to exercise federal question jurisdiction over Warsaw Convention cases removed to

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The Protocols were intended for contemporaneous ratification over 20 years ago, prior to the Second Circuit decision in *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), which found that the Warsaw Convention "creates the universal source of a right of action." Interestingly, respondent, in her attempt to avoid the conditions in Article 17, appears to question whether a cause of action is created by the Convention on the basis she is alleging wilful misconduct. (R. Br. 27-30, 33-36).

federal court. *See Alvarez v. Aerovias Nacionales de Colombia, S.A.*, 756 F. Supp. 550 (S.D. Fla. 1991); *see also Campos v. Sociedad Aeronautica de Medellin Consolidada, S.A.*, 882 F. Supp. 1056 (S.D. Fla. 1994), *appeal dismissed*, No. 94-4153 (11th Cir. Oct. 31, 1995) (remand orders are not subject to a right of appeal); *Calderon v. Aerovias Nacionales De Colombia, Avianca, Inc.*, 738 F. Supp. 485 (S.D. Fla. 1990), *appeal dismissed*, 929 F.2d 599 (11th Cir.) (same), *cert. denied*, 502 U.S. 940 (1991).

3. The lower courts will still be free to follow the erroneous decisions that the scope of the Warsaw Convention is subject to the finding of an accident under unamended Article 17

There is an increasing line of decisions upholding the premise that, for an injury to be within the scope of the Convention, the claim must have been the result of an "accident" under Article 17. *See, e.g., Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996); *Curley v. American Airlines, Inc.*, 846 F. Supp. 280 (S.D.N.Y. 1994); *Levy v. American Airlines, et al.*, 24 Av. Cas. (CCH) 17,581 (S.D.N.Y. June 9, 1993); *Adler v. Malev Hungarian Airlines*, No. 89 Civ. 8252, 1992 WL 15144 (S.D.N.Y. Jan. 23, 1992). Petitioner sought review in this case to correct the lower court's misapplication of (unamended) Article 17 (Pet. Br. 15-21).

The Court should resolve the exclusivity issue and hold that the treaty exclusively governs injuries sustained in the course of international air transportation irrespective of whether the passenger can establish a right of recovery under Article 17. *Compare In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111 (S.D.N.Y. 1991), *reargument denied*, 785 F. Supp. 1168 (S.D.N.Y. 1992).

4. The case presents a compelling question of treaty interpretation on which the lower courts await the decision of the Court

Montreal Protocol No. 4, insofar as passenger claims are concerned, did not repeal the treaty in whole or in part. As the plethora of decisions evading exclusivity demonstrate (*see* decisions cited in points 2 and 3, *supra*), the prospective ratification of Montreal Protocol No. 4 will not end the exclusivity debate. As petitioner has noted (Pet. Reply Br. 18-19; Pet. Br. 38-40), the question of exclusivity transcends the facts of this case. The Court should determine the proper interpretation of this unamended treaty (as applicable to all pending Warsaw Convention cases and to future cases where the cause of action arises without Montreal Protocol No. 4 being effective, either because of the time of the injury or the contracting states involved). This interpretation should not differ under Montreal Protocol No. 4 (which does not amend Article 17 and leaves in place the "however founded" language).

The lower courts are awaiting the decision of the Court to resolve the question whether the Warsaw Convention is exclusive. *See, e.g., Tseng* 122 F.3d at 104 (JA 53); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d at 1492 (dissent); *Campos*, 882 F. Supp. at 1058; *Jack*, 820 F. Supp. at 1226; *Walker v. Eastern Air Lines*, 785 F. Supp. 1168, 1172 (S.D.N.Y. 1992); *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.) (Pet. App. 61a). Absent resolution in this case, the issue will remain unresolved and the district courts of the First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits will still be free to follow case law finding that an injury which was not the result of an Article 17 "accident" enables a passenger to seek recovery under common law. Further, the district courts of the Second and Third Circuits are compelled to follow *Tseng* and *Abramson* and uphold a right to state law causes of action when there is no "accident".

The Court has twice declined to address the issue of the exclusivity of the Convention. *See Air France v. Saks*, 470 U.S. 392 (1985); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). The importance of the treaty question presented, its recurring prospective significance, the unchanged "however founded" language of Article 24 and unamended Article 17 under Montreal Protocol No. 4, and the "significant expenditure of resources by the litigants [and] *amici*" in thoroughly briefing the issues (*Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 125 (1994) (O'Connor, dissenting)) all favor plenary consideration of this fundamental issue of treaty interpretation. The Court should resolve the exclusivity issue to ensure the clear and consistent application of the terms of this treaty by the lower courts.

Respectfully submitted,

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